No. 88-1461

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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RICHARD P. CHRISTY, THOMAS B. GUTHRIE, IRA PERKINS,
*Petitioners,*

v.

MANUEL LUJAN, Secretary of the Interior,
UNITED STATES DEPARTMENT OF THE INTERIOR,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF *AMICUS CURIAE* OF AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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JOHN J. RADEMACHER *
General Counsel

RICHARD L. KRAUSE
Assistant Counsel

AMERICAN FARM BUREAU FEDERATION
225 Touhy Avenue
Park Ridge, Illinois 60068
(312) 399-5795

* Counsel of Record

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The American Farm Bureau Federation respectfully files this brief *amicus curiae*. Pursuant to Supreme Court Rule 36, this brief is filed with the written consent of all parties.

### INTEREST OF AMICUS CURIAE

The American Farm Bureau Federation (AFBF) is a non-profit general farm organization incorporated pursuant to the laws of the State of Illinois. Its purposes are to promote, protect and represent the economic, social and educational interests of farmers and ranchers across the United States. The largest general farm organiza-

tion in the country, AFBF has member state organizations in 49 states (including Montana, Idaho and Wyoming) and Puerto Rico, representing the interests of more than 3.6 million member families.

The protection of private property, including crops and livestock, is of paramount importance to farmers and ranchers if they are to be able to pursue their livelihoods. It is especially important to livestock producers who already suffer staggering losses from predation thus forcing many of them out of business. AFBF has been party to previous litigation seeking protection from predation by coyotes and wolves. We have heard from many of our members regarding similar problems with grizzlies, wolves and other listed species urging our participation in this case.

Farming and ranching are the production of crops and livestock. While land and machinery are essential to production, there can be no agriculture without crops or livestock. Protection of crops and livestock is critical to continued agricultural production. The instant case prevents farmers and ranchers from protecting their crops and livestock from grizzly bear predation, thereby preventing them from pursuing their livelihood.

The instant case not only has ramifications for farmers and ranchers, but for private property owners everywhere. Protection of private property rights strikes to the heart of our societal fabric and must be explicitly recognized by our Constitution. The lower court decision goes beyond a denial of the right to protect property, however. While denying the rights of producers to protect their crops and livestock from grizzly bear destruction, the decision also permits those same bears to be hunted by sportsmen. The clear implication is a subordination of private property rights to the recreational interests of sportsmen. This, we submit, is not what the framers of our Constitution intended.



## STATEMENT OF THE CASE

Petitioners are all former sheep producers who suffered substantial losses from grizzly bears, listed as "threatened" under the Endangered Species Act [16 U.S.C. § 1531 *et seq.*]. The grizzly is "an animal that cannot compromise or adjust its way of life to ours" (inside cover, *Grizzly Bear Recovery Plan*, U.S. Fish & Wildlife Service, 1982) and which had caused depredation to livestock since the early days of settlement of the West (p. 4-5 *Grizzly Bear Recovery Plan*).

Petitioner Christy began experiencing losses of sheep to grizzly bears on or about July 1, 1982. Pursuant to U.S. Fish & Wildlife Service (FWS) regulations [50 CFR 17.40(b)] Mr. Christy contacted the FWS to remove the bears from his property. Their efforts to trap the bears proved utterly fruitless.

By July 9, 1982, Christy had lost 27 sheep to grizzly predation. On that date, in the company of a local FWS agent, Christy noticed grizzlies about to attack his sheep. He killed one of the grizzlies and the other ran off. On July 24, 1982, he removed his sheep and terminated his lease, having lost 84 sheep.

Christy was subsequently charged with "taking" a threatened species in violation of the Endangered Species Act and the procedures set forth in 50 CFR 17.40. That same regulation, while prohibiting a landowner from taking a grizzly that is killing livestock, permits a limited sport hunting season of up to 25 grizzlies per year in the same area where Christy's sheep were located.

Christy's case was heard before an Administrative Law Judge (ALJ). After finding that he "is without jurisdiction to consider whether or not a statute enacted by Congress is constitutional" and that "neither may the question of validity of the implementing Departmental regulations be considered," (Appendix to Petition for

Writ, p. 48a), the ALJ fined Christy $2,500 for removing the bear.

Christy brought an action in the federal court for the district of Montana challenging the application of the Endangered Species Act and implementing regulations on the grounds that he was denied his constitutional rights to protect his property, that his property was "taken" without compensation in violation of the Fifth Amendment to the U.S. Constitution, and claimed that by denying him the right to protect his property but allowing sportsmen to hunt grizzlies, he was denied equal protection under the law.

The district court prohibited any discovery and granted the government's motion for summary judgment on all claims.

The Ninth Circuit, despite finding that "we do not minimize the seriousness of the problem faced by livestock owners such as plaintiffs nor do we suggest that defense of property is an unimportant value," affirmed the district court in an opinion published at 857 F.2d 1324 (9th Cir. 1988). Its primary rationale was that neither the Constitution nor the Supreme Court had explicitly recognized a fundamental right to defend property.

The Ninth Circuit also held that there was no unconstitutional "taking" of Christy's property, citing *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977) and *Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950), *cert. denied*, 341 U.S. 939, 71 S.Ct. 999, 95 L.Ed. 1366 (1951). Those cases hold that neither the state nor the federal government has title to wild animals until they are "reduced to possession by skillful capture." Key to the Ninth Circuit's holding was a finding that "plaintiffs do not contend, and the record does not show, that the federal government physically introduced any bears to the areas near plaintiffs' properties," and therefore was "a question we do not decide." (See ftn. 9, 857 F.2d at 1335).



In fact, there is a genuine issue whether or not the bears that ravaged Christy's flock had been relocated in the area after causing livestock losses elsewhere. (See Affidavits of Richard Christy and Sue Ann Love, *Appendix to Petition for Writ*, pages 35a-40a). Possible capture and relocation of problem bears to Christy's area is certainly relevant to the "taking" issue because these bears would have been reduced "to possession through skillful capture" by the FWS within the *Sickman* and *Douglas* criteria, and the result might very well have been different here. These facts could very well have been determined had the district court permitted discovery.

Petitioners' Request for Rehearing, based on the Affidavits, was denied by the Ninth Circuit.

## REASONS FOR GRANTING THE WRIT

This case raises several fundamental yet unresolved issues regarding the sanctity of private property rights and the extent that those rights are constitutionally protected.

The immediate context of this case permits this Court to define the scope of these rights, as well as to decide specific issues that are of extreme importance to rural areas around the nation.

Wildlife protection statutes such as the Endangered Species Act have been interpreted by the federal agencies as giving them virtual *carte blanche* authority to force private landowners to shelter and feed "protected" wildlife at their own expense. Statutes such as the Endangered Species Act are purportedly for the public benefit, yet the general public has assumed few of the costs of such protection and no responsibility for any damages that protected species might inflict. Instead, those expenses are solely borne by private landowners

like Christy who must sit idly by while protected species feed on crops and livestock. In destroying crops and livestock, these protected species also destroy the very means by which producers can pursue their livelihood.

The problems experienced by agricultural producers are growing in severity and numbers. The very same problems raised here were experienced by ranchers in Minnesota (losses to wolves) [*Brzoznowski v. Andrus*, D.C., Minn., No. CA-5-77-19 (1980)], and in Nevada (losses to wild horses) [*Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986)]. These problems have already sparked conflicts between producers seeking to protect their livelihood and their government which is elected and appointed to represent and serve them.

## I. The Extent and Scope of Private Property Rights Needs Definition

The nation was founded on the basic premise of the right to acquire and possess property without undue interference by the federal government. The court below found no decision by this Court that defines the nature and extent of that right and the ability of private individuals to protect that right.

Several state courts have resolved the issue whether private individuals have a right to protect their property, even if such a right is not expressly mentioned in the state constitution. (See *Cross v. State of Wyoming*, 370 P.2d 371 (Wyo. 1962), and the decisions from numerous jurisdictions cited therein). With the federal government assuming a greater role in protecting wildlife through such statutes as the Endangered Species Act, Wild and Free-Roaming Horses and Burros Act, and the Bald and Golden Eagle Protection Act, to name only a few, the time has come to squarely address the issue within the context of the U.S. Constitution.



The Court has generally described the criteria as to what constitutes a "fundamental right" under the constitution. Rights are "fundamental" if they are "implicit in the concept of ordered liberty" *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) or if they are "deeply rooted in this Nation's history and tradition," *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977). We submit that protection of private property and the ability to pursue an agricultural livelihood meet both standards.

Absent clear direction from this Court, lower federal courts are extremely reluctant to interpret these standards and determine fundamental rights on their own. In *Mountain States, supra*, the Tenth Circuit stated that "No case has yet addressed whether a [right to defend property] exists under the United States Constitution." [1] and declined the express invitation to be the first court to do so.

The Ninth Circuit below was even more reluctant to address the issue without direction from this court. Citing *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) and its caution not to "expand" the reach of the constitution by "re-defining the category of rights deemed fundamental," [2] the Ninth Circuit stated:

> In light of the Supreme Court's admonition that we exercise restraint in creating new definitions of substantive due process, we decline plaintiffs' invitation to construe the fifth amendment as guaranteeing the right to kill federally protected wildlife in defense of property. In so doing, we do not minimize the seriousness of the problem faced by live-

[1] 799 F.2d at 1428, ftn. 8.

[2] 478 U.S. at 194. We submit that a fundamental right to protect property can be found without such "re-definition."

stock owners such as plaintiffs nor do we suggest that defense of property is an unimportant value. We simply hold that the right to kill federally protected wildlife in defense of property is not "implicit in the concept of ordered liberty" nor so "deeply rooted in this Nation's history and tradition" that it can be recognized *by us* as a fundamental right guaranteed by the Fifth Amendment." (Emphasis added.)[3]

It seems clear that both the Ninth and Tenth Circuits are looking for direction from this Court on the issue of whether protection of private property is a constitutionally protected right, since both courts declined to address the issue on their own.

**II. The Regulatory Scheme at Issue Unduly and Arbitrarily Restricts the Defense of Private Property in Violation of the Equal Protection Clause**

Even if the Court were to determine that defense of property is not a "fundamental right" under the constitution, this case still presents a significant issue for resolution concerning the importance of private property rights.

The grizzly bear regulations subordinate the right of a landowner to protect his property to the recreational interests of sport hunters. Under 50 CFR 17.40(b)(1)(i)(C) private landowners must suffer "significant depredations" before a grizzly may be taken from an area, and only then the "taking" must be by a state, tribal or federal authority and only after efforts to trap and remove the bear have proven unsuccessful.[4]

By contrast, 50 CFR 17.40(b)(1)(i)(E) permits sport hunting of up to 25 grizzlies in the area where Christy's

[3] 857 F.2d at 1330.

[4] Efforts to trap and remove bears on Christy's lands were completely unsuccessful, resulting in the loss of 84 sheep.



losses occurred. The only private individuals allowed to kill grizzlies under the regulations are sport hunters.

The regulations prohibiting a private landowner from protecting his own property against grizzlies cannot therefore be sustained on the basis of protecting a threatened species if sport hunting of that species is permitted. Regardless of the degree of importance placed on the protection of private property, there is something disturbingly out of balance in our society if people who are seeking to protect their livelihoods are punished for actions which others are permitted to take for sport.

Neither the Ninth Circuit below nor the Tenth Circuit in *Mountain States* was willing to address this issue until this Court takes action. In the meantime, farmers and ranchers are suffering crop and livestock losses and appear doomed to continue to do so.

**III. This Case Presents Significant Issues Pertaining to Fifth Amendment "Takings"**

Wildlife protection statutes such as the Endangered Species Act are based on the premise that there is a "public benefit" to preservation of protected species. As such, costs for preservation must be borne by the general public. In the present case, as in other cases under these statutes, farmers and ranchers bear a disproportionate share of those costs.

The Ninth Circuit conclusion that "neither the ESA nor the grizzly bear regulations 'force' plaintiffs to bear any burden"[5] is belied by the regulation itself, which provides for removal only after "significant depredations." [50 CFR 17.40 (b)(1)(i)(C)]. The conclusion that such losses are "incidental, and by no means inevitable,"[6] is similarly belied by the statement in the FWS Grizzly Bear Recovery Plan set forth in our State-

[5] 857 F.2d at 1335.

[6] *Ibid.*

ment of Interest, above, that grizzly bear conflicts with livestock have occurred throughout the settlement of the West. There is little question that grizzly-livestock conflicts are "inevitable" in areas where both are found.

The Court has recently reiterated that "the Fifth Amendment just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. ——, 107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987).

In fact the Court, in *First English* and in *Nollan v. California Coastal Commission*, 483 U.S. ——, 107 S.Ct. 3141 (1987), clarified the nature and scope of the Fifth Amendment "taking clause". The present case should be scrutinized in light of these recent decisions.

In both *First English* and *Nollan*, the Court reiterated that takings are more readily found where there are physical invasions "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-435 (1982). There is no question that the grizzlies "physically invaded" Christy's property, and in fact drove him out of business.

*Nollan* further states that the "evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[7] Here, the prohibition against protection of one's property cannot be used to justify any "end" of protecting wildlife as long as sport hunting is permitted.

Courts have permitted the federal government to evade their Fifth Amendment just compensation responsibili-

[7] 107 S.Ct. at 3148.



ties on the grounds that governmental authorities do not "own" wild animals and are therefore, not responsible for their actions. (See *Sickman* and *Douglas*, *supra.*) Governmental agencies, however, impose management criteria and restrictions in implementing wildlife protection statutes that narrow the range in which such animals exist, thereby defining the habitat for these species to a great degree. One example of this management style is the "critical habitat" direction in the Endangered Species Act, 16 U.S.C. § 1533.

As management restrictions and the resultant habitat enhancement become more specific, the more "protected" animals are likely to be found in areas where government wants them. At some point they have crossed the line of being "reduced to skillful capture" for which the government must assume responsibility for the damage these animals cause to farmers and ranchers. That line should be drawn by this Court in order to prevent even more uncompensated injury to agriculture. This case presents a golden opportunity for this Court to resolve this important issue.

This case also presents an opportunity to address one other issue of importance—the responsibility of the government to provide compensation to private landowners for damages caused by "protected animals" which the government has itself *introduced* into an area. This issue is not only significant for areas where the government has relocated "problem bears" or "problem wolves," but is also important in cases where our government is proposing the re-introduction of species in areas where they no longer exist or never existed. Petitioners have mentioned in their Petition the plans to re-introduce wolves into the Yellowstone Park area. There are also plans to re-introduce endangered California condors and black-footed ferrets into areas where they no longer exist. Also, peregrine falcons are being introduced into new areas.

It seems clear that such re-introduced animals have been "reduced to skillful capture" by any test that *Sickman, Douglas* or any other court might apply. There can be no doubt that the government would be responsible for compensation of damages caused to agriculture by such animals within the *Sickman* and *Douglas* criteria.

There is evidence in this case that the grizzlies that attacked Christy's sheep might have been relocated to the area. See Christy and Love affidavits (*Appendix to Petition*, pages 34a-40a) . By prohibiting discovery, the District Court prevented development of these facts which would be vital to Christy's taking claim. The "administrative record" is itself insufficient to resolve the Constitutional claims, because these issues were admittedly not before the ALJ. The Ninth Circuit denied a Petition for Rehearing to develop these facts as well.

We submit both courts were in error in preventing development of these facts and in granting summary judgment to Respondent. Rule 56 of the Federal Rules of Civil Procedure prohibits entry of summary judgment if there is a "genuine issue of material fact." We submit that the affidavits raise such a "genuine issue of material fact" which would quite possibly change the result. Such facts could not be known because the district court prohibited discovery. If Petitioners are to receive justice, these facts should be permitted to be developed.

## CONCLUSION

The nature and extent to which individuals can protect their private property is an important and fundamental issue that has not heretofore been addressed by this Court. Two circuits have now specifically declined to tackle the issue absent direction from this Court. Further, the extent of the Fifth Amendment just compensation clause as applied to damage caused by protected wildlife should be determined in accordance with the recent Supreme Court clarification of this issue.



This case should be reviewed to provide the direction and analysis that lower courts need in order to address these important issues.

Respectfully submitted,

JOHN J. RADEMACHER *
General Counsel

RICHARD L. KRAUSE
Assistant Counsel

AMERICAN FARM BUREAU FEDERATION
225 Touhy Avenue
Park Ridge, Illinois 60068
(312) 399-5795

* Counsel of Record